Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

In the Matter of:
LAURA CLEM,
A Minor Child

LAWRENCE T. NEWMAN and BEVERLY R. NEWMAN,
Petitioners

vs.

THE WORCESTER COUNTY DEPARTMENT
OF SOCIAL SERVICES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF INDIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Newmans, as preadoptive parents, have a liberty interest under the Due Process Clause of the Fourteenth Amendment which required that they be given notice and an opportunity to be heard prior to any attempted removal of their preadoptive daughter, Laura Clem, from their custody?

2. Were the Newmans required to intervene in the Maryland court proceeding in order to preserve their due process rights, even after the Maryland court had issued its decision?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the proceeding below:

Lawrence T. Newman and Beverly R. Newman,
Respondents Below

The Worcester County Department of Social Services,
Petitioner Below

Laura Gail Rachel Clem,
Real Party in Interest

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Lawrence and Beverly Newman, the preadoptive parents of the minor child Laura Gail Rachel Clem ("Laura Clem" or "Laura"), respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals of Indiana affirming the decision of the Marion County Superior Court, Probate Division, granting full faith and credit to a Maryland court order which ordered the removal of Laura Clem from the custody of the Newmans.

OPINIONS BELOW

The opinion of the Indiana Court of Appeals issued on December 12, 1995, is set forth in Appendix A. The opinion of the Indiana Supreme Court denying transfer is set forth in Appendix B. The order of the Worcester County Circuit Court is set forth in Appendix C. The order of the Marion County Superior Court granting full faith and credit is set forth in Appendix D. The Motion for Change of Placement of the Worcester County Department of Social Services is set forth in Appendix E.

JURISDICTION

This cause arises out of a case in which the Worcester County Department of Social Services ("WCDSS"), Petitioner below, obtained a court order from the Worcester County Circuit Court in the State of Maryland, ordering the return of custody of Laura Clem from Lawrence and Beverly Newman, Respondents

below. Laura Clem had been placed with the Newmans in the State of Indiana for the purposes of adoption by her guardian, WCDSS, a Maryland State governmental agency, pursuant to the Interstate Compact for the Placement of Children. The Newmans had not been given notice of the Maryland proceeding, or the opportunity to be heard in that proceeding. WCDSS presented the Maryland removal order to the Marion County Superior Court, Probate Division, an Indiana State court, requesting that the State of Indiana grant full faith and credit to the Maryland court order, which action is the subject of the proceedings below.

During the full faith and credit proceedings in the Indiana court, the Newmans challenged the jurisdiction of the Maryland court to issue the order which terminated their custody of Laura Clem. The basis for the Newmans' challenge was that they had not been given notice of or an opportunity to be heard in the Maryland proceeding; therefore, the Maryland court did not have personal jurisdiction over them, and the Indiana court could not grant the Maryland court order full faith and credit. The Newmans challenged full faith and credit on the basis that their status as the preadoptive parents of Laura gave them a liberty interest in their continued association with Laura, for purposes of the Due Process Clause of the Fourteenth Amendment. This liberty interest gave the Newmans the right to a hearing on the merits prior to the attempted removal of Laura from their custody by the State of Maryland.

The issue of the Newmans' due process rights as preadoptive parents was raised in the trial court, in the Indiana Court of Appeals, and in the Indiana

Supreme Court.

Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. § 1251(B)(3), and under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the following Constitutional provision, the pertinent portion of which is set forth below:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;...

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This case arises out of an interstate adoptive placement. On March 29, 1993, 3 1/2-year-old Laura Clem, along with her twin 7 1/2-year-old brothers, were placed in the home of Lawrence and Beverly Newman, in Indianapolis, Indiana, for the purpose of adoption. The Clem children are Jewish, as are the Newmans. The placement was made pursuant to the Interstate Compact for the Placement of Children by the Worcester County Department of Social Services, a Maryland State agency, which had been granted guardianship over the children with the right to consent to adoption.

The Newmans wanted to adopt the Clem children as a sibling group. WCDSS encouraged the Newmans to consider the Clem children as their own from the time the placement was made. Numerous documents prepared by WCDSS from the beginning of the placement identified the Clem children as "Newman"; in particular, Laura was referred to as "Laura Newman" in these documents. Official legal documents prepared by WCDSS in order to effect the placement identified the anticipated date of adoption as December 15, 1993.

The Clem children had been living in the foster house of John and Mary Eubanks for almost two years prior to their placement with the Newmans. The Eubanks house had been licensed for 12 years by the WCDSS, and dozens of foster children had been placed there over the years. The Eubanks house was a hazardous, ramshackle farm house, without central heat, and with only 2 bedrooms for the 5 adults and 5 or more special-needs children housed there. One of the adults permanently residing in the foster house, John Eubanks, Jr., was a convicted violent criminal, in violation of Annotated Code of Maryland, Family Law, §§5-561(b)(8) and 5-564(a)(2)(iii). John Eubanks, Jr., was well known by local Maryland social service authorities to be a chronic and dangerous felon. There had been years of reports by neighbors to the WCDSS against the Eubanks foster family and house.

Shortly after the placement, the Newmans discovered that both of the Clem boys displayed severe dysfunctionalities, violence, and sexual aggressive-ness, of which the Newmans had never been apprised by WCDSS. The boys were witnessed molesting their little sister, other children, and each

other, by at least 4 separate persons. Within 8 1/2 months after placement, the Newmans had returned both of the brothers to Maryland. One of the brothers was immediately committed to a psychiatric hospital for sexually-abused children, where he remained for over 2 years. The Newmans repeatedly reported, orally and in writing, the Eubanks foster family to WCDSS for investigation of abusing the Clem children, but WCDSS refused to even initiate an investigation, in violation of state and federal law. WCDSS terminated all supervisory visitations of Laura in January, 1994, and made no attempt to reinitiate Laura's supervision until mid-May, 1994.

Laura Clem had fully bonded to the Newmans as her parents, and the Newmans loved Laura as their own daughter and wanted to adopt her. The Newmans, relying on the anticipated adoption date of December 15, 1993, which had been designated by WCDSS, requested that WCDSS consent to their adoption of Laura by letter dated December 7, 1993. Instead of consenting to the adoption, WCDSS applied secretly for an order from the Worcester County, Maryland, Circuit Court, ordering the return of Laura to Maryland. This was done in retaliation for the Newmans' public exposure of the crimes committed in the Eubanks foster house, and in discrimination against the Newmans as Jews. WCDSS filed a Motion for Change of Placement on March 21, 1994, with the Maryland court.

The Newmans were intentionally given no notice by WCDSS of the filing of the Motion, or opportunity to be heard by the Worcester County Circuit Court with respect to the Motion. The Motion for Change of Placement alleged no reasons for Laura's

removal other than that the Newmans' adoptive home was an "inappropriate placement" and that "it would not be in the child's best interest for her to be adopted by said persons."

The Worcester County Circuit Court issued its order the next day, on March 22, 1994, ordering that Laura Clem be returned to the misery of foster care in Maryland. The Worcester County Circuit Court did not hold a hearing, take any competent evidence, or hear any witnesses. Acting solely on the unsupported allegations which were contained in the Motion for Change of Placement filed by WCDSS the day before, the Maryland court granted the Motion.

Immediately upon receipt of the Maryland court order, the plan for the return of Laura to Maryland was put into effect by WCDSS. A Petition to Enforce Foreign Order for Change of Placement was filed by WCDSS in Indiana with the Marion Superior Court, Probate Division, Judge Charles Deiter. The Petition, filed on March 24, 1994, falsely claimed that an "emergency" was present, which required the immediate setting of a hearing. The nature of this "emergency" was never even alleged, let alone established, because no emergency existed. Laura was safe and secure in her adoptive home with the Newmans. But Judge Deiter obliged WCDSS, and set a hearing on the Petition for 5 days hence, on Tuesday, March 29, 1994. WCDSS had purposely timed the first notice to the Newmans of the legal actions against them to coincide with the three consecutive religious Jewish Holy Days. The notes of social worker Trish Riedl reveal that as far back as March 14, 1994, WCDSS specifically planned that the Newmans would be first notified of its action to remove

Laura from their care on March 25, 1994, because WCDSS knew that the Newmans would be prevented from adequately preparing for the hearing on the Jewish Holy Days. Riedl's notes also specify that the attorney representing WCDSS advised that no notice be given to the Newmans about the removal, to deny them legal due process.

The Newmans first received notice during the afternoon of Friday, March 25, 1994, that WCDSS had obtained the Maryland court order for the return of Laura Clem and that the hearing had been set on March 29, 1994, for enforcement of that order in Indiana. The Newmans' Sabbath, followed immediately by the first two Holy Days of Passover, beginning at sunset on Friday, March 25, 1994, and ending at sundown on Monday, March 28, 1994. During their Jewish Sabbath and Passover Holy Days, the Newmans were prohibited by their religion from doing any work, using the telephone, traveling, spending money, etc. This fact was well known by WCDSS. Therefore, the Newmans had less than one day to hire an attorney for the March 29, 1994, hearing.

The Newmans were unable to hire an attorney before the March 29, 1994, hearing in Indianapolis, because of their religious restrictions. Even if the Newmans had been able to hire an attorney on such short notice, the attorney would never have had enough time to prepare adequately for the hearing. The Newmans filed a Motion for Continuance on March 28, 1994, and explained to Judge Deiter prior to the hearing how their Jewish religious convictions had prohibited them from obtaining an attorney and preparing for the hearing. Judge Deiter refused to grant a continuance, and the Newmans were forced to

proceed, pro se and ill-prepared, at the March 29, 1994, full faith and credit hearing. Mr. Newman, a licensed attorney practicing in the area of taxes and pensions, had no training or experience in this area of the law. Mrs. Newman had no legal background at all.

A full hearing ensued, at which WCDSS had two witnesses testify, and introduced numerous documents into evidence, heretofore unknown and unseen by the Newmans. Anne Turner, social worker for WCDSS, testified that she had provided the Maryland court with numerous documents prior to the time the Maryland court ruled on the Motion for Change of Placement, many of which documents were never provided to the Newmans. Said documents were not produced to the Newmans at the Indiana hearing. Mr. Newman at that time requested a continuance of the hearing until such time that the Newmans were provided with all documents which had been given to the Maryland court in support of the Motion for Change of Placement. Judge Deiter denied the motion for continuance.

The Newmans had no witnesses testify and no documents to introduce. A full record was made of the hearing. At the end of the hearing, Judge Deiter granted the parties two weeks to file briefs.

On March 30, 1994, the day following the Indiana full faith and credit court hearing, Lawrence Newman travelled nearly 1,000 miles to Worcester County, Maryland, in order to obtain copies of the documents which had been filed with the Worcester County Circuit Court by WCDSS. The documents were necessary for the Newmans to adequately prepare their legal arguments for the Marion Superior

Court on the issue of full faith and credit. The Worcester County Circuit Court refused to release the documents to Mr. Newman, claiming that the file was confidential. WCDSS refused to provide the Newmans with copies of the documents. Raymond Jarvis, III, the Maryland attorney for WCDSS, told Mr. Newman that some of the documents filed by WCDSS in support of the Motion for Change of Placement had "nothing to do with Laura," and that even if the Newmans obtained a court order, WCDSS would remove said documents before turning the exhibits over to the Newmans. Therefore, on April 7, 1994, the Newmans served discovery requests on WCDSS in order to obtain the documents, and filed another motion for continuance with Judge Deiter, requesting that he continue the time when legal briefs were due until after the Newmans had obtained the documents filed in the Maryland Circuit Court. On the same day, April 7, 1994, Judge Deiter denied the motion for continuance. WCDSS never complied with the Newmans' discovery request.

On April 13, 1994, while the decision by Judge Deiter on whether or not to grant full faith and credit to the Maryland removal order was still pending, the Newmans filed a petition to adopt Laura Clem with Judge Deiter's court.

On May 12, 1994, Judge Deiter issued an Order to Enforce Foreign Order for Change of Placement, granting full faith and credit to the Maryland court order. He ordered that the Newmans return custody of Laura to WCDSS by no later than May 20, 1994. On the same date, May 12, 1994, Judge Deiter set the adoption for trial on June 6, 1994.

The Newmans filed a Verified Emergency Petition To Stay Execution of Probate Court Order, Without Notice, Pending Appeal, with the Indiana Court of Appeals on May 19, 1994. A temporary stay was granted by the Indiana Court of Appeals on May 19, 1994, with a full hearing on a permanent stay scheduled for May 25, 1994. Thirty minutes after hearing oral argument on May 25, 1994, the Indiana Court of Appeals dissolved the stay.

The Newmans immediately thereafter filed for transfer to the Indiana Supreme Court requesting a stay of the Indiana Trial Court's order to remove Laura. The Indiana Supreme Court denied transfer on May 26, 1994. On May 26, 1994, Judge Deiter issued an amended supplemental order, requiring the Newmans to return custody of Laura to WCDSS on Friday, May 27, 1994. On the same date, Judge Deiter issued an order resetting the date of the hearing regarding the Newmans' adoption petition from June 6, 1994, to June 2, 1994. Judge Deiter was now ordering Laura to be returned to Maryland a mere 6 days before her adoption trial was to begin in Indiana.

On May 27, 1994, the Newmans filed a Verified Motion for Temporary Restraining Order and associated pleadings with the Federal District Court, Southern District of Indiana. The District Court denied the Newmans' Motion at approximately 5:30 PM on Friday, May 27, 1994.

Although the Newmans were prepared to deliver Laura pursuant to Judge Deiter's order, they were lured to Judge Deiter's office at 11:00 PM on May 27, 1994, with the promise of an "emergency best interests hearing" for Laura. Instead of the promised

hearing, the Newmans were held against their will and in violation of their holy Sabbath in the judge's office under armed sheriff's guard, while other sheriffs removed Laura from the Newmans' home at 1:10 AM on May 28, 1994. Laura was tossed into the back seat of a vehicle, and shipped back to foster care in Worcester County, Maryland, where she remains to this day. Laura is forced to live with a violent older brother, in violation of Annotated Code of Maryland, Family Law, §5-701(u)(2)(i) and (iii). Beginning June 2, 1994, Laura's adoption trial was held. Laura had lived successfully with the Newmans for 14 months. After a three-day hearing, Judge Deiter dismissed the Newmans' adoption petition.

The Newmans timely pursued the appeal which is the subject of these proceedings. On December 12, 1995, the Indiana Court of Appeals affirmed the judgment of the Marion Superior Court. On February 18, 1997, the Indiana Supreme Court denied transfer.

REASONS FOR GRANTING THE WRIT

I. The issue of the extent of the liberty interest of preadoptive parents needs to be decided.

Certiorari should be granted to determine an issue considered by many states but as yet unanswered by the Supreme Court: the extent of the liberty interest of preadoptive parents with respect to a child who has been placed in their home for adoption, and the consequent due process which is owed by a state to the preadoptive parents before a child can be removed from their custody prior to adoption. As the federal and various state governments move to

provide ever-increasing incentives for would-be parents to adopt children, particularly from American foster care, the significance of this issue becomes increasingly more acute. A nationwide standard mandating due process rights for preadoptive parents is essential in order to prevent another tragedy as befell the Newmans and to encourage adoptions of American foster children.

There are certain Constitutional safeguards relating to the family. The Supreme Court first extended Constitutional protection to the parent-child relationship in 1923 when it explained that although no exact definition of the liberty guaranteed by the Fourteenth Amendment existed, "without doubt ... it denotes the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children." *Meyer v. Nebraska* (1923), 262 U.S. 390, 67 L.Ed. 1042, 43 S.Ct. 625. The Supreme Court has historically recognized that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. *Santosky v. Kramer*, 455 U.S. 745,753 (1982). Choices about marriage, family life, and the upbringing of children are among associational rights the Court has ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect. *M.L.B. v. S.L.J.*, 117 S.Ct. 555,563-564 (1996). "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values,

moral and cultural." *Moore v. East Cleveland*, 431 U.S. 494 at 503-504 (1977).

The potential liberty interests of foster parents in their foster children were recognized, but not determined, by the Supreme Court in *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977). However, when discussing the balancing of private interests in a parental rights termination case, this Court strongly indicated the existence of a liberty interest by foster families in their foster children, which was described as "substantial":

> However substantial the foster parents' interests may be, cf. *Smith v. Organization of Foster Families*, 431 U.S., at 845-847, they are not implicated directly .... For the foster parents, the State's failure to prove permanent neglect may prolong the delay and uncertainty until their foster child is freed for adoption. *Santosky v. Kramer*, 455 U.S. 745,761 (1982).

If foster parents have a liberty interest in their foster children, how much more so do preadoptive parents have a liberty interest in the children who have been given to them for adoption? Foster parents, by definition and contract, enter into a known transitory relationship with their foster children. It is the legal duty of the state agency under federal law to make all efforts to reunite foster children with their biological parents. Foster children are routinely shifted from foster home to foster home. Preadoptive parents, on the other hand, have the expectation of permanency. Children are placed in preadoptive homes with the expectation by the state that the parents will form permanent bonds with the children; bonds so

permanent that they will last a lifetime. Preadoptive parents are encouraged by the state to build a relationship with their preadoptive children, which is so strong that the parents will be willing to make a lifelong legal and financial commitment to the child by adopting the child. In such a circumstance, the liberty interests of biological parents, which are recognized as fundamental, should devolve to the preadoptive parents during the time period prior to actual adoption.

The national trend in the lower courts is to recognize the due process rights of preadoptive parents and to provide them the opportunity to fairly and openly contest agency decisions to remove a child from their home prior to the removal. Although neither Indiana nor Maryland have considered the issue of the due process rights of preadoptive parents, several states have ruled on this question. In the Rhode Island case of *In re Joseph*, R.I., 420 A.2d 85 (1980), a social services organization sought to terminate the placement of a child with prospective adoptive parents. The issue was whether the prospective adoptive parents had standing to contest the issue before the court. The court stated that the proper inquiry in resolving an issue of standing is whether the party seeking judicial review has suffered an "injury in fact," either economic or otherwise, as a result of the action in dispute. The court emphasized that the "injury in fact" need not be substantial. As long as the person seeking judicial review has suffered an injury, he has the requisite personal stake in the outcome of the litigation to confer standing. The removal of the child from the care of the preadoptive parents would have effectively foreclosed the possibility of adoption for them, constituted an injury in fact. Therefore, the prospective adoptive parents in *In re Joseph* had the

requisite standing to contest the social services agency's action to remove the child from their home.

The Supreme Court of Utah made similar holdings in *State in Interest of A.H. v. Mr. & Mrs. H.*, 716 P.2d 284, 286 (Utah 1986). There the court stated that a child's prospective adoptive parents do have a legally-protectible interest. The court found that the prospective adoptive parents had standing to petition for restoration of custody because the actions of the juvenile court could effectively foreclose the possibility of adoption for them.

In *Thelen v. Catholic Social Services*, 691 F.Supp. 1179 (E.D.Wis. 1988), the U.S. District Court in Wisconsin held that the prospective adoptive parents had a liberty interest which was protected under the Fourteenth Amendment. The court stated that unlike foster parents, the prospective adoptive parents cannot be said to expect that their relationship with the child will be ended. To the contrary, the very motive of the prospective adoptive parents, as well as the State, is to secure a life-long relationship between the adoptive parents and the child. That expectation, at least on the part of the prospective adoptive parents, begins with their initial application with the child placement agency. The expectation certainly becomes greater when, after exhaustive evaluation, the prospective parents are informed by the agency that they qualify for the placement of a child in their home; and it becomes greater still when a child is actually placed in the home. Although no legal guardianship of the child has changed at this time, there can be little doubt that the expectation of the prospective adoptive parents will be that the child eventually will be theirs forever. The court continued

by stating that it cannot be said that the parents with whom the child has been placed have a reasonable expectation that the relationship will eventually be terminated. The *Thelen* court concluded that within the context of Wisconsin law, the prospective adoptive couple had a limited, but not wholly insignificant, constitutionally protected liberty interest in their family unit. The *Thelen* court held that in this case, due process did not require that a hearing be held prior to the removal of the child, because the pre-removal process used by the agency satisfied the prospective adoptive parents' due process rights.

In the present case, no pre-removal process of any type involving the Newmans was ever even initiated by WCDSS, and no accusations against the Newmans concerning Laura were alleged. The first notice which the Newmans received concerning removal was when they were served with the Petition to Enforce Foreign Order for Change of Placement on March 25, 1994, three days after the Maryland court had issued its order authorizing removal.

The Pennsylvania court in *Mitch v. Children & Youth S.S. Agency*, 556 A.2d 419 (Pa.Super. 1989) determined that prospective adoptive parents had standing to contest the decision of the legal custodian, a child welfare agency, to remove from their custody a child placed with them for adoption. The court stated that prospective adoptive parents, unlike foster parents, have an expectation of permanent custody which is genuine and reasonable. Because of this expectation of permanency, prospective adoptive parents are encouraged to form emotional bonds with the child from the first day of the placement. By removing the child from the care of the prospective

adoptive parents, the agency forecloses the possibility of adoption. In light of the expectation of permanent custody that attends an adoptive placement, an agency's decision to remove a child constitutes a direct and substantial injury to prospective adoptive parents.

The Pennsylvania case of *Matter of Adoption of Sturgeon*, Pa.Super., 445 A.2d 1314, 1321 (1982) is instructive as to proper procedures in a pre-adoption case. The court stated that from the moment that the State, in the guise of the court and the agency, assumed the custody of the child, it also assumed an obligation to exercise its powers in the child's best interests. This was the sole standard for any decision on adoption, and it is one that should be applied on full facts elicited during hearings in which all pertinent facts are placed before the court. In discussing the fact that a prospective adoptive family had not been given notice of hearing and opportunity to be heard, the court stated that it could not know what support systems might have been mobilized to train the preadoptive parents, who were never given their chance to explain their interpretations of hearsay evidence or to confront adverse witnesses.

The instant case is similar to the *Sturgeon* case. The Newmans were given no notice of the filing of WCDSS's Motion for Change of Placement. The Maryland court did not conduct a hearing. The Newmans had no opportunity to confront adverse witnesses or to explain their version of hearsay. Had the Newmans been given their due process rights, the Maryland court would have had a full record before it, not a one-sided record of hearsay, and the Maryland court may have come to the opposite conclusion.

The California case of *C.V.C. v. Superior Court of Sacramento Cty.* (1973) 29 Cal.App.3d 909, 106 Cal.Rptr. 123, sets forth cogent analysis of the constitutional issues involved in determining the rights of preadoptive parents to notice and hearing prior to the taking of their child. In discussing the state statute, which gave unfettered discretion to adoption agencies to terminate adoptive placements, the court noted that the statute was nonetheless still subject to overriding constitutional limitations. The court determined that the Constitutional rights of the pre-adoptive parents required that a trial de novo be held prior to removal of the child, at which both parties would be accorded coextensive areas of supporting and rebutting evidence.

The *C.V.C.* court discussed the Constitutional guarantees due preadoptive parents when faced with the specter of the loss of their child to agency action:

> The Fourteenth Amendment's guarantee of due process of law requires notice and an opportunity to be heard before an individual suffers governmental deprivation of a fundamental interest. Entitlement to procedural protections depends upon the extent to which "grievous loss" is threatened; it requires the court to weigh the individual's interest in avoiding the loss against the governmental interest in summary adjudication. The opportunity for hearing must precede, not follow, the deprivation, except for extraordinary occasions where some valid governmental interest justifies summary deprivation....Gain of a child for adoption fulfills the prospective parents' most cherished hopes. The event

> marks the onset of a close and meaningful relationship. The emotional investment does not await the ultimate decree of adoption. The placement initiates the "closest conceivable counterpart of the relationship of parent and child (citation omitted)." To characterize enforced removal of the child as a "grievous loss" is to state the obvious....The scope of judicial review accorded constitutionally protected interests is shaped by constitutional and not statutory factors.

The logic of the *C.V.C.* court is clear and cogent. Even if a state's statutory scheme does not provide for pre-removal notice and hearing before a court, constitutional guarantees of due process compel them nonetheless.

In the present case, the Newmans cherished Laura as their own daughter long before her adoption could become a reality. They committed themselves totally to her well-being, as is amply demonstrated by their three-year legal battle to bring her back to their family from her tragic life in foster care. WCDSS encouraged the Newmans to make Laura a permanent part of their family as soon as possible. Even before Laura came to live with the Newmans, she was referred to in WCDSS agreements with the Newmans as Laura Newman. WCDSS set an anticipated adoption date of December 15, 1993, which the Newmans relied upon. The Newmans have invested as much of themselves in Laura Clem as any parents have with their biological child. All of the factors which lead to the recognition of a Constitutional liberty interest by a preadoptive family in their adoptive child are present here.

Some states have recognized the liberty interests of preadoptive parents, but have determined that the parents had been provided with sufficient due process. In *Denver DSS v. Dist. Court of 18th Jud. D.* (1987), 742 P.2d 339, (Colo.), the Colorado court upheld the Ohio removal order of the preadoptive children because the preadoptive parent had received notice of the Ohio proceedings and knew the subject matter of those proceedings.

In the Kansas case of *Spielman v. Hildebrand*, 873 F.2d 1377,1385 (10th Cir. 1989), the court upheld the removal order of a child from her preadoptive family because it found that the preadoptive parents had been accorded an opportunity to be heard in a meaningful manner prior to deprivation of any liberty interest, via a full hearing in state court prior to losing custody of their preadoptive daughter. They were notified of the hearing and attended with counsel. They had the opportunity to present evidence and to cross-examine opposing witnesses.

Unlike the preadoptive parents in the previously-cited cases, the Newmans were intentionally deprived of any form of due process hearing prior to Laura's removal. They were therefore unable to challenge the illegality of Laura's removal from their care. Code of Maryland Annotated Regulations (COMAR) Section 07.02.12.19E states:

> Removal of a Child from Adoptive Home. The local department may remove a child before a final decree of adoption is issued if, in the opinion of the local department, conditions in the adoptive home impair the child's security in the family and jeopardize the physical or

emotional development of the child.

This Regulation sets forth the sole basis for removing a child from a preadoptive home under Maryland law. WCDSS never even alleged in its March 21, 1994, Motion for Change of Placement that the conditions in the Newman home impaired Laura Clem's security in the Newman family and jeopardized the physical or emotional development of Laura Clem. The Motion merely alleged that Laura Clem was in an "inappropriate placement." Inappropriate placement is not a basis, under Maryland law, for the legal removal of a child from an adoptive home. The Motion for Change of Placement, on its face, is clearly in violation of Maryland law. Had the Newmans been given their due process rights, in the form of notice and opportunity to be heard, they could have demonstrated such to the Maryland court.

Liberty interests entitled to protection under the Fourteenth Amendment may be created by administrative regulations. *King v. Hilton*, 525 F.Supp. 1192 (D.C.N.J. 1981). Where a regulation placed substantive limitations on official discretion, state-created liberty interest exists for purposes of due process analysis. *Gibbs v. King* , 779 F.2d 1140 (C.A.5 La. 1986). The United States Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones* (1980), 445 U.S. 480,488, 63 L.Ed.2d 552, 100 S.Ct. 1254. A liberty interest created by statute includes the right to the requisite procedures necessary to protect that liberty interest. *Connecticut Board of Pardons v. Dumschat* (1981), 452 U.S. 458,463, 69 L.Ed2d 158, 101 S.Ct.

158, citing *Wolf*, 418 U.S. at 557.

The Newmans were never given an opportunity to contest on the merits Laura's removal from their custody. The Newmans were never provided a pre-removal or even a post-removal hearing at which they could present their evidence regarding removal of Laura. The full faith and credit proceeding was the only legal proceeding made available to them. However, the full faith and credit proceeding was extremely limited in scope. That proceeding was limited only to considering whether the Maryland court had proper jurisdiction to issue its removal order. The Indiana court could not consider any of the merits of the case.

It was the intent of WCDSS from the beginning to foreclose the Newmans from any opportunity to contest Laura's removal on the merits. The WCDSS attorney advised it not to give the Newmans any notice of Laura's impending removal, with the intent to preclude the Newmans from obtaining due process.

No tribunal ever considered the best interests of Laura Clem. Had the Newmans been given the opportunity to participate in the Maryland court proceedings, they would have been able to put evidence before the court that it was in Laura's best interest to remain in their custody, and that it was in Laura's best interest not to be returned to the custody of WCDSS. WCDSS never even alleged, let alone proved, that the conditions in the Newman home impaired Laura Clem's security in the Newman family and jeopardized the physical or emotional development of Laura Clem, as required by COMAR Section 07.02.12.19E to prove that Laura's best

interests required that she be removed from the Newman home. The Newmans could have demonstrated that WCDSS was in violation of numerous Maryland statutes, all against the best interests of Laura Clem. WCDSS violated Annotated Code of Maryland, Family Law, §§5-561(b)(8) and 5-564(a)(2)(iii) by placing Laura in a foster home with a violent criminal. The Newmans could have demonstrated that WCDSS intended to put Laura in long-term foster care, in violation of Annotated Code of Maryland, Family Law, §5-525(c)(5). The Newmans could have demonstrated that it was the wish of Laura's birth family that Laura receive a Jewish upbringing and that she be adopted by a Jewish family, since Laura is Jewish by birth, and that WCDSS would not place Laura in another Jewish home in compliance with Annotated Code of Maryland, Family Law, §5-520(a). WCDSS had shown antagonism to the Jewish religion of the Newmans and Laura throughout the proceedings. WCDSS had intentionally planned and implemented to discriminate against the Newmans and treat them differently because of their religion, by manipulating the court hearing dates so that the Newmans would be unable to be prepared due to their Jewish Holy Days. Most importantly, the Newmans could have demonstrated to the court, through competent testimony and evidence, that it was in Laura's best interest to be part of their family, the family that Laura loved as her own. As a result of WCDSS's actions, the Newmans were never given an opportunity in any forum to contest Laura's removal from their custody.

In its Fourteenth Amendment, our Constitution imposes on the states the standards necessary to ensure that judicial proceedings are fundamentally

fair. *Lassiter v. Department of Social Services*, 452 U.S.18,33 (1981). Our adversary system presupposes that accurate and just results are most likely to be obtained through the equal contest of opposed interests. *Lassiter v. Department of Social Services*, 452 U.S.18 at 27-28.

The extent to which procedural due process must be afforded the citizen is influenced by the extent to which he may be condemned to suffer grievous loss, and depends upon whether the citizen's interest in avoiding that loss outweighs the governmental interest in summary adjudication. *Goldberg v. Kelly*, 397 U.S. 254,262-263 (1970). The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385,394 (1914). The hearing must be at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545,552 (1965). In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *Goldberg v. Kelly*, 397 U.S. 254,269 (1970). Where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. *Greene v. McElroy* , 360 U.S. 474,496 (1959). The decisionmaker's conclusion must rest solely on the legal rules and evidence adduced at the hearing. To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on. *Goldberg v. Kelly*, 397 U.S. 254,271 (1970).

In the instant case, WCDSS denied the Newmans all aspects of due process through secret proceedings, secret files/exhibits, and secret allegations for Laura's removal. In the present case, there were no realistic allegations of danger to Laura in the Newmans' custody. In fact, WCDSS terminated all supervisory visitations in January, 1994, and made no attempt to reinitiate Laura's supervision until mid-May, 1994. The actions of WCDSS demonstrate that it had no concerns regarding Laura's safety in the Newman household.

Throughout the proceedings below, WCDSS claimed that Maryland law does not provide for notice and opportunity to be heard to a preadoptive family prior to the removal of a child from the family's custody by the state. However, even if Maryland lacked such a statutory scheme, such lack would not relieve it of the need to provide the preadoptive family with Constitutionally-required due process. The "minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Santosky v. Kramer*, 455 U.S. at 745, quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980).

The right to due process is one of the fundamental rights of our democratic system of government. The need for a fully-informed judiciary, through full participation of all parties, is particularly critical in the case of the adoptive placement of children, where the court's decision will have lifetime impact on both the preadoptive parents and the child. Neither Laura Clem, a poor fatherless child, nor the

Newmans, who invested years of their lives in raising and trying to adopt Laura, were given justice.

Judge the poor and fatherless;
Do justice to the afflicted and destitute. - Psalm 82

Does the Constitution require a party to intervene in a case in which the court has already issued its decision?

The Indiana Court of Appeals did not reach the question of the Newmans' Constitutional rights as preadoptive parents to notice and opportunity to be heard, because the Court of Appeals held that the Newmans had an obligation to intervene in the Maryland proceeding in order to protect their rights. However true that proposition may be when a court has yet to issue its decision, such a requirement is Constitutionally infirm if the court has already issued its order. In the present case, the Newmans were not even apprised of the Maryland proceeding until three days after the Maryland court had issued its order requiring the return of Laura Clem to Maryland. The Newmans were therefore being required to intervene after the Maryland court had made its decision against them.

The right to be heard ensured by the guarantee of due process has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. *Richards v. Jefferson County, Ala.*, 116 S.Ct. 1761,1766 (1996), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306,314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The law does not impose upon any person absolutely entitled to a hearing the burden of

voluntary intervention in a suit to which he is a stranger. *Chase Nat. Bank v. Norwalk*, 291 U.S. 431,441, 54 S.Ct. 475, 78 L.Ed. 894 (1934). A State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. *Brinkerhoff-Faris Trust & Sav. Co v. Hill*, 281 U.S. 673,682, 50 S.Ct.451, 74 L.Ed. 1107 (1930). A state court's freedom to rely on prior precedent in rejecting a litigant's claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party. *Richards v. Jefferson County, Ala.*, 116 S.Ct. 1761,1769 (1996).

In *Martin v. Wilks*, 490 U.S. 755, 104 L.Ed.2d 835, 109 S.Ct. 2180 (1989), the petitioners argued that because the respondents failed to timely intervene in the initial proceedings, even though they were aware of the suit, they should not be permitted to later litigate the issues in a new action. The Supreme Court ruled that a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined.

Under these precedents, it was not the obligation of the Newmans to intervene in the Maryland case. The WCDSS attorney had advised the agency not to give the Newmans advance notice of the plan to remove Laura from their custody, in order to preclude the Newmans from taking appropriate legal steps to preserve their rights. WCDSS knew that by filing its Motion for Change of Placement, it would be affecting the Newmans' substantive rights, and that any resulting court order would have to be enforced against the Newmans in order to effect a change of

custody of Laura Clem. Having chosen to leave the Newmans out of the judicial process in Maryland, WCDSS cannot thereafter reap the fruits of its actions through a full faith and credit proceeding in Indiana.

Furthermore, there was little likelihood that the Newmans would have been successful in intervening in the guardianship case after the Maryland Court had issued its removal order. Petitions for intervention after a decree are very unusual and are seldom granted. *Baltimore Trust Co. v. Interocean Oil Co.*, D.C. Md., 30 F.Supp. 484 (1939).

Even if the Newmans had been successful in intervening in the Maryland proceeding or appealing it, such intervention or appeal would not have cured the due process violation resulting from the failure to give the Newmans notice and opportunity to be heard at the inception, since the burden which the Newmans would have had to meet to overcome the court order which had already been issued was greater at that point in time than if the Newmans had been present to contest the issue from the beginning. See *In re M.N.M.*, D.C., 605 A.2d 921 (1992); *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).

Since the Newmans were not given their due process rights in the Maryland proceeding, and were effectively foreclosed from any meaningful intervention in the Maryland proceeding, Indiana was in error in granting full faith and credit to the Maryland court order.

The Supreme Court has held that when a Virginia state court heard no testimony regarding the best interests of the children in a custody case, a

South Carolina state court was not required to give full faith and credit to the Virginia court's order of dismissal of the case. *Ford v. Ford*, 371 U.S. 187, 83 S.Ct. 273 (1962). In another case, the Supreme Court reversed an Ohio court decision which gave full faith and credit to a Wisconsin divorce decree awarding custody of children to their father. That decree was obtained in an ex parte divorce action in a Wisconsin court which had no personal jurisdiction over the mother. *May v. Anderson*, 345 U.S. 528, 73 S.Ct. 840 (1953).

The Fourteenth Amendment to the United States Constitution provides in part that no State shall "deprive any person of life, liberty, or property without due process of law." U.S.CONST. amend XIV, §1. Maryland courts have expressly upheld the due process rights guaranteed by the Constitution, noting that full faith and credit to a foreign decree may be refused if it was issued through an ex parte proceeding and the state issuing the decree did not have in personam jurisdiction over the person who did not receive notice of the proceedings. Notice must be calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections, the notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. *Madaio v. Madaio*, 259 A.2d 524, 526, 256 Md. 80 (1969).

The Indiana Supreme Court has likewise required notice and opportunity to be heard as a prerequisite to granting full faith and credit to a foreign decree, even prior to the enactment of the Fourteenth Amendment. The Constitution of the United States, requiring full faith and credit to be given in each state

to the judicial proceedings of every other state, does not apply to a judgment which has been rendered without the defendant's having had legal notice of the suit. *Cone v. Cotton and Another* (1827), 2 Blackf. 82.

Under the circumstances of this case, the failure to give the Newmans notice and opportunity to be heard in the Maryland proceeding was fatal to their ability to contest on the merits the removal of Laura Clem from their custody. By obtaining a Maryland court order and bringing it to Indiana for full faith and credit, WCDSS effectively estopped the Newmans from ever having the opportunity to contest Laura's removal on the merits. This is a violation of the most basic due process rights due all citizens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 16, 1997

APPENDIX A

ATTORNEY FOR APPELLANTS:

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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF:

L.C., A Minor Child,
and
LAWRENCE T. NEWMAN AND
BEVERLY R. NEWMAN,
Appellants-Respondents,

vs.

WORCESTER COUNTY DEPARTMENT OF
SOCIAL SERVICES
Appellee-Petitioner

No. 49A05-9405-CV-194

659 N.E.2d 593 (Ind.Ct.App. 1995)

APPEAL FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Charles J. Deiter, Judge
Cause No. 49D08-9403-AD-95

December 12, 1995

FOR PUBLICATION

RUCKER, Judge.

The Circuit Court of Worcester County, Maryland entered an order removing the minor child, L.C., from the home of Lawrence and Beverly Newman. The Worcester County Department of Social Services (WCDSS) then sought to enforce the order through the Marion County Superior Court. After conducting a hearing, the trial court gave full faith and credit to the Maryland Court order and directed that L.C. be removed from the Newman home. The Newmans now appeal raising five issues for our review which we consolidate and rephrase as follows:

1. Whether the trial court erred in denying the Newmans' request for continuance?
2. Whether the trial court erred in affording the Maryland Court order full faith and credit.

Finding no error, we affirm.

This is a companion case to Matter Of The Adoption Of L.C. (1995), Ind.App., 650 N.E.2d 726 wherein we

affirmed the trial court's decision dismissing the Newmans' petition to adopt L.C. The essential facts providing the bases for the instant appeal are these. On March 29, 1993 WCDSS placed with the Newmans for possible adoption then three year old L.C. and her two brothers, seven year old twins, R.C. and M.C. Prior to placement the states of Maryland and Indiana had entered into an Interstate Compact Agreement in accordance with the Interstate Compact for the Placement of Children (Compact). The state of Maryland as the sending agency retained jurisdiction over the children for all matters concerning their care and custody. In accordance with the Compact the Children's Bureau of Indianapolis was appointed to supervise the children's placement in the Newman home. The Children's Bureau assigned Patricia Riedl as the caseworker. Also, the Newmans, WCDSS, and the Children's Bureau entered into a Placement Agreement which provided in part that WCDSS had the right to remove the children at any time prior to adoption if, in WCDSS's opinion, removal was in the children's best interest.

In September 1993, inspired by numerous problems with the twins, the Newmans requested WCDSS to remove M.C. from their home. Three months later the Newmans made a similar request concerning R.C. Ultimately both boys were returned to the state of Maryland. In December 1993 the Newmans contacted Ann Turner another social worker assigned to the case and informed her they wanted to adopt L.C. immediately. Concerned about the Newmans' parenting skills and methods of discipline, Turner met with L.C.'s court appointed attorney and officials of WCDSS to discuss L.C.'s placement with

the Newmans. The parties agreed that a psycho-social evaluation of L.C. and the Newmans was necessary to determine if the adoption should proceed. Riedl then met with the Newmans to discuss the required evaluations. However, because the Newmans insisted on a series of pre-conditions, the evaluations never took place. Less than two weeks thereafter, on January 24, 1994, the Newmans faxed a letter to Riedl demanding, among other things, that any further communication between them and Riedl should be in writing. Within ten days of the receipt of the letter, Riedl notified the Indiana Interstate Compact Office concerning the impasse that she had reached with the Newmans. After efforts to work with the Newmans proved unproductive, WCDSS and the Children's Bureau concluded that it would be in L.C.'s best interest if the minor child were placed with or near her brothers in Maryland. They also concluded that continued placement with the Newmans would impair L.C.'s security and jeopardize her physical and emotional development.

On March 21, 1994 WCDSS filed in the Worcester County Circuit Court a Motion for Change of Placement. WCDSS did not join the Newmans as parties to the action and the Newmans were neither served with notice of the motion nor made aware of the time or date of the hearing. The Circuit Court of Worcester County entered an order granting the WCDSS motion on March 22, 1994. Two days later, March 24, 1994, WCDSS presented the Maryland order to the Marion County Superior Court through a Petition to Enforce Foreign Order for Change of Placement. The Newmans were served with notice the following day and a hearing was scheduled for March

29, 1994.

On the day of the hearing the Newmans appeared without counsel. Lawrence Newman, an attorney licensed to practice law in the State of Indiana, acting pro se, requested a continuance which the trial court denied. After the hearing concluded the trial court ordered that L.C. should remain in the Newman home and allowed the parties six weeks to brief the issues raised at the hearing and to present supporting documentation on their respective positions. On May 12, 1994 the trial court rendered its decision concluding, among other things, that it was required by Article 4, Section 1 of the Constitution of the United States to give full faith and credit to the order of the Circuit Court of Worcester County, Maryland. Consequently the trial court entered an order directing the Newmans to return L.C. to WCDSS. Pursuant to a Writ of Execution to enforce the order, WCDSS removed L.C. from the Newman home on May 28, 1994 and returned her to the State of Maryland. The Newmans now appeal.

I.

The Newmans first contend the trial court erred in denying their request to continue the March 29, 1994 hearing. According to the Newmans they needed additional time to obtain counsel, properly prepare for the hearing, and obtain records filed with the Maryland court.

The grant or denial of a motion for continuance rests in the sound discretion of the trial court and will be reversed only for abuse of that discretion. *Strutz v.*

McNagny (1990), Ind.App., 558 N.E.2d 1103, trans. denied. The record shows the Newmans filed a written motion requesting a continuance of not less than two weeks. After the motion was denied, the hearing proceeded with appellant Lawrence Newman acting pro se. A member of the bar of this state, Mr. Newman presented cogent and well reasoned arguments to the trial court, raised timely and appropriate objections, and effectively cross-examined witnesses presented by WCDSS. At the close of the hearing, the trial court allowed the parties two weeks to submit legal briefs in support of their respective positions. Both sides complied. After the initial briefs were submitted, the trial court then allowed an additional four weeks for the parties to file supplemental and reply briefs.

Although abuse of discretion will be found in the denial of a motion for continuance when the movant has shown good cause for granting the motion, no abuse of discretion will be found when the movant is not prejudiced by the denial. *Hudgens v. McAtee* (1992), Ind.App., 596 N.E.2d 286. Even assuming for the sake of argument the Newmans demonstrated good cause to support their motion for continuance, they have not shown prejudice by the denial of their motion. Mr. Newman effectively represented the Newmans' position at the hearing. Also, availing themselves of the court's briefing schedule, the Newmans filed five post-trial briefs totaling over 120 pages which included numerous exhibits. by way of their post-trial briefs, the Newmans were afforded ample opportunity to present whatever additional evidence or argument they might otherwise have presented had the hearing been continued for two weeks. We find no abuse on this issue.

II.

The Newmans next contend the trial court erred in granting full faith and credit to the judgment of the Maryland Circuit Court. First, according to the Newmans, because they were neither given notice nor served with process concerning the Maryland proceedings, the Maryland Circuit Court had no jurisdiction over them and thus the judgment rendered by that court is void.

A.

Article IV Section 1 of the United States Constitution provides "Full Faith and Credit shall be given in each state to the Public Acts, Records and Judicial Proceedings of every other State." This clause imposes an obligation on each state to enforce the rights and duties validly created under the laws of other states. *Underwriters National Assurance Co. v. North Carolina Life and Accident* (1982) 455 U.S. 691, 102 S.Ct. 1357, 71 L.Ed.2d 558. There is a presumption that the judgment of a state court should be afforded the same credit, validity and effect in every other court of the United States which the judgment had in the state where it was pronounced. Id. However, only where the court in the first state had jurisdiction to decide the case on its merits, is a judgment from that state conclusive upon the merits in another state's courts. Id. Consequently, before an Indiana court is bound by a foreign judgment, it may inquire into the jurisdictional basis for that judgment. If the first court did not have jurisdiction over the subject matter or relevant parties, then full faith and credit need not be given. Id.

Citing *Wilmer v. Epstein* (1911), 116 Md. 140, 81 A. 379, 381, the Newmans contend that in the state of Maryland, a judgment entered without jurisdiction over one of the parties is "wholly void." (Cf. *Lucas v. Estate of Stavos* (1993), Ind.App., 609 N.E.2d 1114 reh'g denied, trans. denied; In Indiana a judgment entered without jurisdiction over the parties is merely voidable rather than void). Thus, the Newmans contend, the judgment here is not entitled to full faith and credit by the courts of this state.

We have no quarrel with the continued validity of *Wilmer*. However the question presented here is whether the Newmans were parties to the Maryland court proceedings in the first place. If the Newmans were parties to the Maryland court proceedings in the first place. If the Newmans were parties to that proceeding, then under Maryland law the judgment entered is void because the Maryland Circuit court never acquired jurisdiction over them. *Wilmer*, 81 A. 379, 381. On the other hand, if the Newmans were not parties to the Maryland court proceedings, then the judgment is not void, at least not on jurisdictional grounds. We conclude that the Newmans were not parties to the Maryland court proceedings and we begin our analysis with an instructive quote:

> While, in a larger legal sense, the term "party" or "parties" has been defined as any or all persons who have a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies, the term "party or parties to the action" is generally used to designate the person or persons who are seeking to establish

> a right and a person or persons on whom it is sought to impose a corresponding duty or liability, and the term "party to a proceeding" in its ordinary legal meaning is held to embrace such persons only as are parties in a legal sense, and to have been made or become such in some mode prescribed or recognized by the law, so that they are bound by the proceeding.
>
> Whether a person is a party to an action must be ascertained exclusively by an inspection of the record. It can appear in no other way.

Hupp v. Hammer (1983), Ind.App., 445 N.E.2d 579,581 quoting 22 I.L.E. Parties § 1 (1959). An inspection of the record in this case shows that the proceedings under which L.C. was made a ward of WCDSS were captioned "In The Matter Of The Petition For Guardianship Of A Minor." Record at 421. The February 12, 1993 decree provided among other things, that the WCDSS was "granted Guardianship with the right to Consent to the Adoption and/or Long Term Care of [L.C.] .... " Id. The Newmans were neither mentioned in the body of the decree nor were they named as parties to the guardianship action. Under a slightly modified caption[1] WCDSS filed a Motion For change Of Placement on March 22, 1994. This time the Newmans were mentioned in the body of the pleadings, again however they were not named as parties to the action. Although we recognize that courts look beyond the caption and nominal parties in determining the actual parties to a proceeding, more importantly, it is not clear that under Maryland law the Newmans had any right to "control the proceedings, to make defense, to adduce and cross-examine

witnesses, and to appeal from the decision." *Hupp*, supra. A third party who neither appears nor has a right to appear and produce evidence or cross examine witnesses or take an appeal, cannot be regarded as a party. *Smith v. Midwest Mutual Ins. Co.* (1972), 154 Ind.App. 259, 289 N.E.2d 788,794.

Maryland trial rules apparently provide only one method by which one not named a party to an action may become an active litigant. Specifically, Maryland Rule 2-214 sets forth the procedure by which one may intervene in a pending action. That procedure includes the filing of a petition before the trial court.[2] Although the Newmans very well may have prevailed on a timely filed petition to intervene, they filed no such petition and were never made parties to the Maryland Circuit Court proceedings. As a result, the Newmans' argument that the judgment is void for lack of jurisdiction must fail.

The Newmans contend they nonetheless should have been named as parties to the Change of Placement proceedings. In support they direct our attention to Maryland Rule 2-211 which provides in relevant part:

> (a) Persons to be Joined. - Except as otherwise provided by law, a person who is subject to service of process shall be joined as a party in the action if in the person's absence
> (1) complete relief cannot be accorded among those already parties, or
> (2) disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action or

> may leave persons already parties to a substantial risk incurring multiple or inconsistent obligations by reason of the person's claimed interest.

See also *Fairbanks v. McCarter* (1993), Md.App., 622 A.2d 121 (The requirement that necessary parties be joined exists to assure that a person's rights are not adjudicated unless that person has his or her day in court); *Newark Trust Co. v. Talbot Bank* (1958), 217 Md. 141 141 A.2d 516 (All persons who are so interested, although indirectly, in the subject matter and the relief granted, shall be made parties to the suit).

Assuming without deciding that the Newmans were necessary parties to the Change of Placement proceedings as contemplated by Maryland Rule 2-211, they still cannot prevail. As previously noted, under Maryland law a judgment rendered without jurisdiction over one of the parties is wholly void. *Wilmer* , 81 A. 379,381. However, the Newmans cite no authority and our own research reveals no authority suggesting that a Maryland judgment rendered without adding a necessary party is also wholly void. To the contrary such a judgment appears to be merely voidable. See eg. *Eyler v. Eyler* (1992), Md.App., 609 A.2d 376 (Declaratory judgment entered without necessary party being joined vacated and cause remanded; however, there was no indication that judgment was void ab initio). The distinction between a void judgment versus a merely voidable judgment is critical to the Newmans' claim. While a void judgment is one which "has no effect whatsoever, and is incapable of confirmation or ratification" *Lucas v. Estate of Stavos*, (1993) Ind.App., 609 N.E.2d 1114,1117, a voidable judgment "operates

to accomplish the result sought to be accomplished, until the fatal flaw is judicially ascertained and declared." Id. Unlike a void judgment, a merely voidable judgment is not subject to collateral attack in this state and must be challenged in the state where it was rendered. *Aramovich v. Doles* (1964), 244 Ind. 658, 195 N.E.2d 481; *Stickler v. Mack* (1985), Ind.App., 473 N.E.2d 621; see also *Sommers v. Equitable Bank* (1988), Md.App., 543 A.2d 377,379 ("[A] judgment or decree which is merely erroneous or voidable is not, with relatively rare exceptions, subject to collateral attack."). The Newmans did not challenge the Maryland judgment in the courts of that state, and the courts of this state are not prohibited from giving full faith and credit to judgments that are merely voidable.

B.

The Newmans also contend they had a Fourteenth Amendment due process right to notice and an opportunity to be heard in the Maryland court before the Change of Placement order was entered. In support the Newmans cite a number of cases for the proposition that prospective adoptive parents have legally protectible interests which afford them standing to contest a social agency's action in removing a child from a prospective adoptive parent's home.

The question of whether prospective adoptive parents have constitutionally protected interests in a child placed in their custody has not been decided by the courts of this state or the courts in the state of Maryland. and it is not appropriate that we decide the question here. Rather, it is appropriate only that we address whether the failure to provide the Newmans

with notice and an opportunity to be heard renders the Maryland court order void and thus not entitled to full faith and credit. We think not. As earlier indicated a judgment is a void judgment if the court that rendered it lacked jurisdiction over the subject matter of the relevant parties. See *Underwriters National* 455 U.S. 691. Although the Newmans ostensibly challenge the Maryland Circuit court's subject matter jurisdiction, their actual challenge is squarely addressed to that court's personal jurisdiction.[3] We have already determined that Newmans' personal jurisdiction argument must fail. Thus, contrary to the Newmans' position, whether or not they had standing to contest the Maryland court order has no bearing on whether the judgment is void.

C.

Next the Newmans contend the Maryland court judgment should not be given full faith and credit for the additional reason that the court did not have personal jurisdiction over L.C. according to the Newmans whatever jurisdiction the state of Maryland may initially have had, it lost once WCDSS violated the terms of the Compact. The Compact provides in relevant part:

> (a) The sending agency shall retain jurisdiction over the child sufficient to determine all matters relating to the custody, supervision, care, treatment and disposition of the child which the sending agency would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting, or is

> discharged with the concurrence of the appropriate authority in the receiving state. The jurisdiction shall also include the power to effect or cause the child's return or transfer to another location and custody as provided by law. The sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of placement.

Ind. Code § 12-17-8-1 and Md. Fam. Law Code Ann. § 5-6-6(a). (emphasis added). The record shows the Newmans and WCDSS entered into a placement agreement which provided in pertinent part "Larry and Beverly Newman, hereby agree to accept into [ ] our home [L.C.] from the Worcester Co. Dept. of Social Services on March 29, 1993, assuming complete financial responsibility for the child's care with the intention of adopting [ ] her." Record at 441. (emphasis added). According to the Newmans, by shifting the financial responsibility for L.C. to them, and failing to conduct supervised monthly visits with L.C., WCDSS violated the terms of the Compact. Thus, the argument continues, Maryland's jurisdiction over L.C. lapsed.

We first observe there is nothing in the Compact itself which suggests that a violation of its terms results in a loss of jurisdiction. However, in interpreting the Compact at least one state court determined that if allegations were true that in violation of the Compact the state of Florida had terminated all financial assistance to a minor child shortly after the child had been placed in the state of West Virginia then the court "would be forced to conclude that Florida's jurisdiction over the child had clearly lapsed." *State of Fla. DHRS*

v. Thornton (1990), W.Va., 396 S.E.2d 475,481. The Newmans rely on *Thornton* in support of their argument.

Even were we forced to reach a similar conclusion, the facts here do not support the notion that the state of Maryland terminated financial assistance to L.C. The record reveals that either contemporaneous with or shortly after L.C. and her twin brothers were placed in the Newman home in March 1993, WCDSS began sending the Newmans five hundred and thirty five dollars ($535.00) per month in compliance with the terms of an Adoption Assistance Subsidy Agreement. In March 1994, shortly after WCDSS filed its motion for Change of Placement in the Worcester County Circuit Court, WCDSS sent the Newmans a letter indicating the monthly subsidy was being discontinued. The grounds therefore were that the original basis for the subsidy no longer existed, namely there was no longer a sibling group in the Newman home because L.C.'s twin brothers had been removed at the Newmans' request. Over the next several weeks, even as the hearing in this case proceeded along, a flurry of letters and faxes erupted between the Newmans and WCDSS. As a result, WCDSS reversed itself and sent the Newmans a letter dated April 29, 1994 stating in part "the Department will, for the time being, given the current circumstances, continue payments to you in an amount equal to the adoption subsidy." Record at 258. There is no indication in the record exactly when the subsidy was ultimately discontinued. However we presume the same occurred at or near May 28, 1994 at which time L.C. was removed from the Newman home.

The Newmans do not contest the apparent fact that

they received from WCDSS over $5,000.00 for the fourteen or so months that L.C. was in their care. Rather, they contend the payments were "merely voluntary, elective, optional, and discretional." Brief of Appellant p. 44. The Newmans' argument is premised on the theory that by entering into the Placement Agreement requiring them to assume complete financial responsibility for L.C., WCDSS (a) violated the terms of the Compact and (b) absolved itself of the statutory responsibility to care for the minor child. Thus, according to the Newmans, any payments made to them by or through the WCDSS were in the nature of a gift. The Newmans' argument is not persuasive.

First, the Compact is essentially a contract between the participating states. *McComb v. Wambaugh* (1991), 3rd. Cir., 934 F.2d 474,478. And having entered into a contract, a participant state may not unilaterally change its terms. Id. Thus, regardless of its wording, the Placement Agreement which the Newmans entered with WCDSS, did not and could not alter the relationship between the State of Maryland and the State of Indiana as set forth in the Compact. Essentially, WCDSS as the sending agency, continued to have financial responsibility for the support and maintenance of L.C. during the period of the child's placement in the Newman home. See Ind. Code § 12-17-8-1 and Md. Fam. Law Code Ann. § 5-606(a). Second, the record is clear that WCDSS fulfilled its statutorily imposed financial responsibility. By sending the Newmans a monthly subsidy for L.C.'s care, even assuming they were in the nature of a gift as the Newmans contend, WCDSS demonstrated that it had neither abandoned L.C. nor terminated assistance for her as was the case in *Thornton*. As for

the Newmans' claim that WCDSS failed to provide monthly supervised visitations with L.C., (a) the Compact provides no such requirement, and (b) the record shows that Patricia Riedl, a social worker from the Children's Bureau of Indianapolis, made numerous visits to the Newmans' home as well as their school. The visits were discontinued in January 1994 when the Newmans demanded that "all further communications be in writing." Record at 185-186.

D.

Finally the Newmans insist that full faith and credit should not be given the Maryland court order because it violates the public policy of this state. See *Ballard v. Board of Trustees* (1983), Ind.App.., 452 N.E.2d 1023, trans. denied. (The full faith and credit clause does not require one state to apply another state's laws in violation of its own legitimate public policy). According to the Newmans the public policy of this state in protecting the welfare of children was contravened by the Maryland court order because it was entered without a legitimate determination of L.C.'s best interest. The Newmans complain that they were not given an opportunity to be heard by the Maryland court, and instead the court made its decision based upon hearsay submitted by a WCDSS social worker who had not seen or talked to L.C. since she had been placed in the Newmans' home.

The Placement Agreement which the Newmans entered provides among other things that WCDSS "has the right to remove the child at any time prior to adoption should the 'department of Social Services consider it to be in the child's best interest." Record at

12. Implicit in the Compact and as specifically set forth in the agreement, WCDSS as L.C.'s legal guardian had the authority to determine in the first instance whether remaining in the Newman home was in L.C.'s best interest. By filing a motion for Change of Placement with the Maryland Circuit Court, WCDSS obviously concluded that remaining in the Newman home was not in L.C.'s best interest. That the court entered an order granting the motion does not demonstrate the state of Maryland's policy regarding a child's best interest is any different than this state's own public policy. WCDSS stood before the court as L.C.'s legal guardian and there is no indication in the record before us that L.C.'s court appointed counsel objected to the WCDSS motion. In sum, we do not agree with the Newmans that the Maryland court order violated the public policy of this state.

A judgment from a sister state which is regular and complete on its face is presumed valid, and one who attacks the jurisdiction of a court from a sister state which issued the judgment must rebut that presumption. *Omni Micro, Inc. v. Hyundai Electronics America* (1991), Ind.App., 571 N.E.2d 598. In this case the Newmans failed to rebut that presumption. Accordingly, the trial court properly gave full faith and credit to the order of the Maryland Circuit court. We therefore affirm the judgment.

JUDGMENT AFFIRMED.

SHARPNACK, C.J. and BARTEAU, J. CONCUR.

[1] "Exparte In The Matter Of A Petition For Guardianship With The Right To Consent To The Adoption Of [L.C.]." Record at 449.

[2] Modeled after the Federal Rule, and similar to Trial Rule 24 of the Ind.Rules of Procedure, Maryland Rule 2-214 INTERVENTION provides in relevant part:

(a) Of Right. Upon timely motion, a person shall be permitted to intervene in an action:

(1) when the person has an unconditional right to intervene as a matter of law;

(2) when the person claims an interest relating to the property or transaction that is the subject of the action, and the person is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest unless it is adequately represented by existing parties.

(b) Permissive

(1) Generally. - Upon timely motion a person may be permitted to intervene in an action when the person's claim or defense has a question of law or fact in common with the action.

* * *

(c) Procedure. A person desiring to intervene shall file and serve a motion to intervene.

[3] At oral argument conducted December 1, 1995, the Newmans maintained the Maryland Circuit Court lacked subject matter jurisdiction because it had no personal jurisdiction. However, the two are not the same and are analyzed differently. "Subject matter jurisdiction" is the power of a court to hear and adjudicate a particular class of cases. *Putnam County*

Hospital v. Sell (1993), Ind.App., 619 N.E.2d 968. The issue of subject matter jurisdiction is resolved by determining whether the claim involved falls within the general scope of authority conferred on the court by state Constitution or by statute. Id. Under Md. Fam. Law Code Ann. § 1-201, an equity court, such as the Worcester County Circuit Court, has general jurisdiction over custody or guardianship of a minor child. Further, courts have subject matter jurisdiction without reference to any particular parties. *Pivarnik v. Northern Indiana Public Service Co.*, (1994) Ind., 636 N.E.2d 131.

APPENDIX B

217 STATE HOUSE
INDIANAPOLIS, IN 46204

H. JOHN OKESON
CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

(317) 232-1930
FAX (317) 232-8365

49A05-9405-CV-00194 Lower Court Number: 49D089403AD95

NEWMAN, LAWRENCE T., ETAL -V- DEPT. OF SOCIAL SERVICES

You are hereby notified that the SUPREME COURT has on this day 2/18/97
APPELLANT'S PETITION FOR TRANSFER IS HEREBY DENIED.
RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR

WITNESS my name and the seal of said Court,
this 18th day of February, 1997

H. John Okeson
Clerk Supreme Court, Court of Appeals and Tax Court

APPENDIX C

EX PARTE
IN THE MATTER OF A PETITION
FOR GUARDIANSHIP WITH THE
RIGHT TO CONSENT TO THE ADOPTION
OF LAURA GAIL RACHEL CLEM

IN THE CIRCUIT COURT FOR
WORCESTER COUNTY, MARYLAND
CASE NO. 689A ADOPTION

ORDER OF COURT

Upon consideration of the aforegoing Motion for Change of Placement, it is this 22 day of March, 1994, by the Circuit Court for Worcester County, Maryland,

ORDERED, that the Court finds that it is not in the best interest of the Respondent, Laura Gail Rachel Clem, to remain in the adoptive home; and it is further

ORDERED, that the respondent, Laura Gail Rachel Clem, be, forthwith, removed from the adoptive home and returned to the custody of the Worcester County, Maryland, Department of Social Services for placement in foster care; and it is further

ORDERED, that these proceedings be subject to the further order of this Court.

s/ Theodore Eschenburg
JUDGE

APPENDIX D

STATE OF INDIANA	IN THE MARION SUPERIOR COURT, PROBATE DIVISION
COUNTY OF MARION	CAUSE NO. 49D08-9403-AD-000095

IN THE MATTER OF
THE ADOPTION OF
LAURA GAIL RACHEL CLEM

ORDER TO ENFORCE FOREIGN ORDER FOR CHANGE OF PLACEMENT

1. Laura Gail Rachel Clem was born on December 23, 1989.

2. On February 12, 1993, in Cause No. 689A, the Circuit Court for Worcester County, Maryland, appointed the Department guardian of Laura Gail Rachel Clem, with the right to consent to adoption.

3. On or about March 29, 1993, the child was placed in the home of Lawrence T. Newman and Beverly R. Newman for the purpose of adoption after a supervisory period of at least six (6) months.

4. On March 22, 1994, in the same guardianship proceeding, the Court ordered:
...that the Respondent, Laura Gail Rachel Clem, be, forthwith, removed from the adoptive home and returned to the custody of the Worcester County, Maryland, Department of Social Services...

5. The order was requested by the Department of Social Services for Worcester County, Maryland, in its Motion for Change of Placement.

6. The Legal Aid Bureau, Inc. of Maryland, counsel of record for Laura Gail Rachel Clem, consented to the entry of the order of March 22, 1994.

7. Lawrence T. Newman and Beverly R. Newman had no prior notice of the Motion for Change of Placement or of the resulting order.

8. At all times since February 12, 1993, the Circuit Court for Worcester County, Maryland, has had, and continues to have, subject matter and in personam jurisdiction over Laura Gail Rachel Clem.

9. At the time it entered its order on March 22, 1994, the Circuit Court for Worcester County, Maryland, had not acquired in personam jurisdiction over Lawrence T. Newman and Beverly R. Newman.

10. The order is enforceable without in personam jurisdiction over Mr. and Mrs. Newman because Maryland law does not afford foster parents the right to notice or hearing prior to removal of a child from their home.

11. This Court is required by Article 4, Section 1 of the Constitution of the United States to give full faith and credit to the order of the Circuit Court of Worcester County, Maryland.

IT IS THEREFORE ORDERED that Lawrence T. Newman and Beverly R. Newman, no later than Friday, May 20, 1994, at 4:00 P.M., return custody of Laura Gail Rachel Clem to the Department of Social Services for Worcester County, Maryland, its agent or its designee.

DATED this 12th day of May, 1994.

CHARLES J. DEITER, JUDGE

APPENDIX E

EX PARTE
IN THE MATTER OF A PETITION
FOR GUARDIANSHIP WITH THE
RIGHT TO CONSENT TO THE ADOPTION
OF LAURA GAIL RACHEL CLEM

IN THE CIRCUIT COURT FOR
WORCESTER COUNTY, MARYLAND
CASE NO. 689A ADOPTION

MOTION FOR CHANGE OF PLACEMENT

Comes now the Department of Social Services for Worcester County, Maryland, (hereinafter referred to as the "Department") by its attorneys, Raymond R. Jarvis, III and Jarvis and Hyle, and moves this Court for a change of placement and, as reasons therefore, says as follows:

1. That on February 12, 1993, the Circuit Court ordered that the Department of Social Services for Worcester County, Maryland, be granted guardianship with the right to consent to adoption of Laura Gail Rachel Clem, the above referenced Respondent; and

2. That, pursuant to said Order, on March 29, 1993, the Children's Bureau of Indianapolis; the Worcester County, Maryland, Department of Social Services; and Lawrence T. Newman and Beverly R. Newman entered into a Placement Agreement, a photocopy of said Agreement being attached hereto, marked Exhibit "A", and prayed to be made a part hereof; and

3. That subsequent investigation of the adoptive home of Lawrence and Beverly Newman by the Children's Bureau of Indianapolis have found it to be an inappropriate placement for Laura and, further, that it would not be in the child's best interest for her to be adopted by said persons; and

4. That, pursuant to the Placement Agreement, the adoptive parents understand that the Department of Social Services for Worcester County, Maryland, has the right to remove the child at any time prior to adoption whenever they consider it to be in the child's best interest; and

5. That the Legal Aid Bureau, attorney for the Respondent, has been contacted and feels, likewise, that it would be in the best interests of the child for her to be removed from the adoptive home and returned to Worcester County for placement in foster care.

WHEREFORE, you Movant respectfully prays:

A) That the Court order the return of the child from the adoptive home in Indianapolis, Indiana to the custody of the Department of Social Services for Worcester County, Maryland; and

B) that the Court award such other and further relief as to the cause may seem proper

s./ Raymond R. Jarvis, III
Jarvis and Hyle
3505 Coastal Highway
Ocean City, MD 21842
(410) 289-1414